TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 76.

CHIN YOW, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED AUGUST 1, 1907.

(20,326.)

(20,322.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 15, 1907.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Supreme Court, to be holden at the City of Washington, District of Columbia, within 60 days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California wherein Chin Yow is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John J. De Haven United States District Judge for the Northern District of California this 4″ day of June, A. D. 1906.

JOHN J. DE HAVEN,
United States District Judge.

2 [Endorsed:] No. 13564. U. S. Supreme Court. Chin Yow, Appellant, *vs.* United States. Citation on Appeal. Filed Jun- 4, 1906. Jas. P. Brown, Clerk U. S. District Court, Northern District of California, By J. S. Manley, Deputy Clerk.

Service of a copy admitted this 4th day of June, 1906.

BENJ. L. McKINLEY,
Ass't U. S. Attorney.

UNITED STATES OF AMERICA, *ss:*

On this — day of ——, in the year of our Lord one thousand nine hundred and —, personally appeared before me F. D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the subscriber, —— —— and makes oath that he delivered a true copy of the within citation to —— ——.

Subscribed and sworn to before me at San Francisco, California, this — day of —— A. D. 190—.

—— ——.

—— ——
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

3 In the District Court of the United States in and for the Northern District of California.

In the Matter of CHIN YOW, on *Habeas Corpus.*

To the Honorable John J. De Haven, Judge of the District Court of the United States in and for the Northern District of California:

The petition of the undersigned respectfully shows:—

That Chin You is unlawfully imprisoned, detained, confined and restrained of his liberty by the General Manager of the Pacific Mail

Steamship Company, in the City and County of San Francisco, State and Northern District of California.

That the imprisonment, detention, confinement and restraint aforesaid are illegal, and the illegality thereof consists in this, to wit:

That it is claimed by the said General Manager of the above mentioned steamship company that the said passenger is a subject of the Emperor of China, and must not and cannot be allowed to land and remain within the United States, under the provisions of the Act of Congress of May 6, 1882, entitled "An Act to execute certain treaty stipulations relating to Chinese," and the acts amendatory thereof and supplemental thereto. That the said Chin You does not come within the restrictions of said Acts, but, on the contrary, your petitioner alleges that the said Chinese person was and is a resident of the United States; that said Chinese person is entitled to be and remain in the United States by virtue of the fact that he was born within the United States and is a citizen thereof; that he was born in the City and County of San Francisco, California, that his
4 parents were at the time of his birth domiciled residents of the United States; that he lived in the United States from the time of his birth until 1904, when he went to China temporarily on a visit; that he returned to the United States on the steamship Siberia and arrived at the port of San Francisco, on or about July 2nd, 1905, and that he applied to the Commissioner of Immigration at the Port of San Francisco, to be permitted to land; that he was prevented, by Rule 6 of the Rules of the Department of Commerce and Labor, promulgated with reference to the enforcement of the Chinese Exclusion Laws, from communicating with an attorney, or friends, or any person whatsoever, through whose assistance he could obtain evidence and proof to sustain his claim that he was born in the United States; that the officials of the Commissioner of Immigration caused an investigation and examination of the right of your petitioner to land on the ground that he was born in the United States, and that they examined, besides the sworn statement of your petitioner, but — Chinese persons, who, so your petitioner is informed and believes, testified that your petitioner was born in the United States; that the examinations of your petitioner and of the — Chinese persons referred to were held in secret and apart one from the other, and that at none of the examinations was your petitioner represented by his attorney or counsel; that no legal or competent evidence was presented to show, or tending to show, in the slightest degree that the testimony of the petitioner and of the Chinese persons examined were not true, but that the Commissioner of Immigration arbitrarily and in gross abuse of his discretion as such officer, and without legal or any cause or justification, rejected the testimony and sworn statements of said petitioner and of the Chinese persons referred to, and denied your petitioner a landing within the United States;

That your petitioner thereupon took an appeal to the Department of Commerce and Labor, which affirmed the decision of said Commissioner of Immigration; that he was thereupon placed in the cus-

tody of the Pacific Mail Steamship Company to be sent to China.

That your petitioner, although claiming to be a citizen of the United States, had and was given no opportunity to advise with an attorney and have the assistance of counsel at the hearing before the Commissioner of Immigration, and he was denied opportunity to communicate with friends and persons who could have obtained overwhelming evidence and proof of the fact that your petitioner was born in the United States and was a citizen thereof.

That had your petitioner been given the opportunity to have an attorney, and to communicate with his friends and other persons, he could have produced abundant and overwhelming evidence to show that he was born in the United States, and remained within the United States, until 1904, when he departed to China on a temporary visit; that among other, he could have produced the following persons who would have so testified: E. G. Manasse, Harry Short, Lewis J. Norton, Chin Boek Teu, Chin Wah, Chin Wing, Sam Hop, Lee Soot, Chin Yin Toy, and many others.

That he was in the employ of the Sawyer Tanning Company of Napa, California, from November 1901 to May 1904.

That he was prevented by said officials from obtaining the above named witnesses and evidence in his behalf; that he was prevented from obtaining an attorney or communicating with his friends or persons who could, by proper effort and investigation, locate persons who knew of the birth of petitioner in the United States and of his having remained in the United States until the day of his departure from the United States, in 1904, to China; that he was examined in secret session by said officials and no attorney was permitted to be present at the examination of your petitioner or of that of the Chinese persons above referred to; that after he was denied landing by said Commissioner of Immigration, he was refused a copy of the evidence and proceedings had and taken before said Commissioner of Immigration; that his attorneys, Marshall B. Woodworth and O. P. Stidger, were not, and have not since said denial to land, been permitted to read, or even peruse, and much less to make a copy of the evidence and proceedings had before said Commissioner of Immigration upon the investigation above referred to; that Rules 7-8-9 and 21 of the Regulations promulgated by the Secretary of Commerce and Labor and the Commissioner of General Immigration governing the admission of Chinese persons into the United States, are as follows:—

"Rule 6. Immediately upon the arrival of Chinese persons at any port mentioned in Rule 4, it shall be the duty of the officer in charge of the administration of the Chinese exclusion laws to adopt suitable means to prevent communication with them by any persons other than officials under his control, to have said Chinese persons examined promptly, as by law provided, touching their right to admission and to permit those proving such right to land.

Rule 7. The examination prescribed in Rule 6 should be separate and apart from the public, in the presence of Government officials,

and such witness or witnesses only as the examining officer shall designate; and, if upon the conclusion thereof, the Chinese applicant for admission is adjudged to be inadmissible, he should be advised of his right of appeal and his counsel should be permitted, after duly filing notice of appeal, to examine, but not to make copies of, the evidence upon which the excluding decision is based.

Rule 8. Every Chinese person refused admission under the provisions of the exclusion laws by the decision of the officer in charge at the port of entry must, if he shall elect to take an appeal to the Secretary, give written notice thereof to said officer within two days after such decision is rendered.

Rule 9. Notice of appeal provided for in Rule 8 shall act as a stay upon the disposal of the Chinese persons whose case is hereby affected until a final decision is rendered by the secretary; and, within three days after the filing of such notice, unless further delay is required to investigate and report upon new evidence, the complete record of the case, together with such briefs, affidavits, and statements as are to be considered in connection therewith, shall be forwarded to the Commissioner General of Immigration by the officer in charge at the port of arrival, accompanied by his views thereon in writing; but on such appeal no evidence will be considered that has not been made the subject of investigation and report by the said officer in charge.

Rule 21. The burden of proof in all cases rests upon the Chinese persons claiming the right of admission to, or residence within, the United States, to establish such right affirmatively and satisfactorily to the appropriate government officers, and in no case in which the law prescribes the nature of the evidence to establish such right shall other evidence be accepted in lieu thereof, and in every doubtful case the benefit of the doubt shall be given by administrative officers of the United States Government."

That your petitioner prays that a writ of *habeas corpus* may be granted directed to the General Manager of the said Steamship Company commanding him to have the body of Chin You before your Honor, at a time and place therein to be specified, to do and receive what shall then and there be considered by your Honor con-
7 cerning him, and together with the time and cause of his detention, and the said writ, and that he may be restored to his liberty.

CHIN YOW.

Subscribed and sworn to before me this 11th day of April, 1906.

[SEAL.] ADELINE COPELAND,
Notary Public in and for the City and County of San Francisco, State of California, 232 *Crocker Building.*

MARSHALL B. WOODWORTH,
Att'y for Petitioner.

O. P. STIDGER,
Of Counsel.

Endorsed: Application for writ denied. April 12, 1906. John J. De Haven, Judge. Filed Apr. 12, 1906. Jas. P. Brown, Clerk. By J. S. Manley, Deputy Clerk.

8 *Order Denying Petition for Writ of Habeas Corpus.*

At a stated term of the District Court of the United States for the Northern District of California, held at the Court-room in the City and County of San Francisco, on Thursday, the 12th day of April, A. D. 1906.

Present: The Honorable John J. De Haven, Judge.

(Number and Title of Case.)

In this matter, H. K. Wolf, on behalf of Marshall B. Woodworth, Attorney for the petitioner, presented the petition for a writ of *Habeas Corpus* herein. After hearing Mr. Wolf, it is by the Court ordered that said petition be, and the same is hereby, denied.

9 In the District Court of the United States in and for the Northern District of California.

In the Matter of CHIN YOW, on *Habeas Corpus.*

Notice of Appeal.

To the United States Attorney:

You are hereby notified that Chin You intends to, and hereby does, appeal from the orders and judgments of the District Court of the United States, in and for the Northern District of California, denying the right of the said Chin You to land in the United States, and ordering him deported to the Empire of China, made by the above Court on the 12th day of April, 1906.

MARSHALL B. WOODWORTH,
Attorney for Appellant.

Dated April 13th, 1906.

Endorsed: Filed Apr. 13, 1906. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

10 In the District Court of the United States in and for the Northern District of California.

In the Matter of CHIN YOW, on *Habeas Corpus.*

Petition for Appeal.

The said Chin You, through his attorney, feeling himself aggrieved by the order and judgment of this Honorable Court, made and entered on 12th day of April, 1906, denying the petition for a Writ of *Habeas Corpus,* does hereby appeal from said judgment, order and decision, to the Supreme Court of the United States, and

prays that his appeal may be allowed, and that a copy of the record of all the proceedings and papers upon which said judgment, order and decision were made, duly authenticated, may be sent forthwith to the Supreme Court of the United States.

MARSHALL B. WOODWORTH,
Attorney for Appellant.

Endorsed: Filed Apr. 13, 1906. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

11 In the District Court of the United States in and for the Northern District of California.

In the Matter of CHIN YOW, on *Habeas Corpus.*

Assignments of Error.

Now comes the said Chin You, through his attorney, and specifies the following as the errors upon which it will rely, and which it will urge upon his appeal:—

1. That the Court erred in denying the petition for a Writ of *Habeas Corpus.*

2. That the Court erred in holding that it had no jurisdiction to entertain a Petition for Writ of *Habeas Corpus.*

3. That the Court erred in holding that it had no jurisdiction in the matter.

4. That the Court erred in not holding that the averments of the petition for a Writ of *Habeas Corpus* were sufficient to justify, in law, the granting and issuing of the Writ of *Habeas Corpus.*

5. That the Court erred in not holding that the fact that the said petition for Writ of *Habeas Corpus* alleged that the petitioner was and had been, at all times mentioned in the petition for Writ of *Habeas Corpus*, a citizen of the United States of America, and entitled to be and remain therein, gave the Court jurisdiction to hear and determine said matter, and to grant said petition for writ of *Habeas Corpus.*

MARSHALL B. WOODWORTH,
Attorney for Petitioner.

Endorsed: Filed Apr. 13, 1906. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

12 In the District Court of the United States in and for the Northern District of California.

In the Matter of CHIN YOW, on *Habeas Corpus.*

Order Allowing Appeal.

In view of the petition for appeal heretofore filed in the above entitled matter:—

It is ordered that an appeal be allowed as prayed for, and it is further ordered that the said Chin You remain in his present custody and that all proceedings be stayed, pending the hearing and final determination of said appeal.

JOHN J. DE HAVEN,
District Judge.

Dated April 13th, 1906.

Endorsed: Filed April 13, 1906. Jas. P. Brown, Clerk. By J. S. Manley, Deputy Clerk.

13 I, James P. Brown, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and hereunto annexed twelve (12) pages, numbered from 1 to 12, inclusive, contain a full, true, and correct transcript of the record in said District Court in the Matter of Chin Yow, on *Habeas Corpus,* No. 13564.

I further certify that the cost of said record, amounting to Five dollars and fifty cents ($5.50) has been paid by Marshall B. Woodworth, Attorney for Appellant.

Witness my hand and seal of said Court at San Francisco, this 12th day of June, A. D. 1906.

[Seal U. S. District Court, Northern Dist. of California.]

JAS. P. BROWN, *Clerk.*

Endorsed on cover: File No. 20,322. N. California, D. C. U. S. Term No. 76. Chin Yow, appellant, *vs.* The United States. Filed August 1, 1906. File No. 20,322.

Office Supreme Court, U. S.
FILED.
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Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 76.

CHIN YOW,
Appellant,
against
THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Brief of the Appellant.

MAXWELL EVARTS,
Of Counsel for Appellant.

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

DARK PAGE BL

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 76.

CHIN YOW,
Appellant,

AGAINST

THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF THE APPELLANT.

Statement.

The petition for the writ of *habeas corpus* shows that Chin Yow, the appellant in this case, was born in the city of San Francisco, Cal., and had lived in the United States, from the time of his birth, until 1904, when he went to China on a visit. He returned to the United States in July, 1905, and was not permitted to land by the inspector of immigration at the port of San

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Francisco. He presented to the immigration officers his claim, that he was a citizen of the United States, by reason of his birth in San Francisco, but was prevented from communicating with any attorney, friend or any person whatever. He was examined by the immigration inspector at the port of San Francisco, and he furnished a sworn statement with reference to his birth in the United States. Other witnesses, who were Chinese, were examined by the government, but how many were examined is not known, as the witnesses were interrogated in secret and apart one from the other, and no one has ever been permitted to see a record of the proceedings. It is believed that the witnesses examined sustained the claim of the appellant as to his birth in the United States. The inspector did not require additional testimony, although the petitioner had white witnesses as well as further Chinese witnesses, who were ready to prove his birth in this country, but arbitrarily, and in abuse of the discretion given him by act of Congress, declined to permit the appellant to introduce further testimony and ordered him deported.

An appeal from the decision of the immigration officer was thereupon taken to the Depart-

ment of Commerce and Labor, which affirmed the ruling of the inspector.

Thereupon application was made by the appellant to the United States District Court for the Northern District of California, for a writ of *habeas corpus*. In his petition, the appellant showed unlawful action, and abuse of discretion and power, on the part of the inspector who excluded him. Among other things, it was claimed in the petition for the writ that, if the appellant had been given an opportunity, he could have produced a large number of witnesses, both white and Chinese, who would have proved by overwhelming evidence, that he was born in the United States, and he names three white men and six Chinamen who knew as to his birth in this country, and residence here, from the time of his birth until the year 1904, when he went to China on a visit. He also alleges, that he was in the employ of a tanning company at Napa, California, from November, 1901, to the time of his departure upon a visit to China in May, 1904. The appellant further states in his petition, that he was prevented by the immigration officers from obtaining the evidence of the witnesses whom he names in his petition, and

that he was prevented from obtaining an attorney, or communicating with friends or persons who could locate and bring before the immigration officers, the persons who knew the facts as to his birth in the United States, and his having remained there until he went to China in 1904. He further states in his petition, that he was prevented from landing by the immigration officers, and that he was refused a copy of the evidence and proceedings taken before them, and that his attorneys have never been permitted at any time to read, and much less to make a copy of, the evidence taken before the immigration officers.

The court denied the petition for the writ of *habeas corpus*, and from the order refusing the writ, this appeal has been taken.

Specifications of Error.

The Court below erred:

(1) In denying the petition for a writ of *habeas corpus*.

(2) In refusing to issue the writ of *habeas corpus* and investigating the truth of the allegations contained therein.

(3) In refusing to grant a writ of *habeas corpus* upon a petition alleging that the appel-

lant was a citizen of the United States, and showing by the facts therein stated, that his exclusion from the United States by the immigration officers, was the result of unlawful action on their part, and abuse of their discretion and powers.

ARGUMENT.

FIRST POINT.

A United States District Court cannot refuse to grant a writ of habeas corpus upon a petition alleging that the applicant is a citizen of the United States, and asserting facts showing that he was ordered deported from his country by the arbitrary action of the immigration officers and the abuse of their discretion and powers.

It is apparently settled by the decision of this Court in the case of *United States* v. *Ju Toy*, 198 U. S., 253, that a citizen of the United States of old New England stock or of distinguished Virginia ancestry, may be excluded and ordered deported from the United States by an immigration officer without the

right of appeal to the courts, so long as the exclusion and order of deportation result simply from an error of judgment on the part of the immigration officer.

It is somewhat disconcerting to think that a citizen of the United States of French or German descent, might be ordered deported because he had ophthalmia, and the immigration inspector at the port of landing believed him to be a Frenchman or German (inasmuch as he looked like one and talked like one), and to be making the claim of citizenship solely for the purpose of enabling him to land in spite of the contagious trouble with his eyes. If the immigration officer is honest in his belief, and gives a full hearing to this citizen of the United States, then the latter can have no relief from any court, but must be banished from his country.

The decision in the *Ju Toy case*, with which three members of the Court did not agree, was based largely upon a prior decision of this Court in the case of *Lem Moon Sing* v. *United States*, 158 U. S., 538, in which case the applicant was an alien. No consideration seems to have been given to the fact that since the decision in the *Lem Moon Sing case*, this Court had held

in the case of *United States* v. *Wong Kim Ark*, 169 U. S., 649, that a citizen of the United States stood upon a different footing from an alien, and that the provisions of the Act of Congress of 1894 which were construed in the *Lem Moon Sing case*, had no application to a citizen of the United States. At page 653, Mr. Justice GRAY, speaking for the Court, said:

> "It is conceded that, if he is a citizen of the United States, the acts of Congress known as the Chinese Exclusion Acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him."

Again, at page 699, it was said:

> "The right of the United States, as exercised by and under those acts, to exclude or to expel from the country persons of the Chinese race, born in China, and continuing to be subjects of the Emperor of China, though having acquired a commercial domicil in the United States, has been upheld by this court, for reasons applicable to all aliens alike, *and inapplicable to citizens, of whatever race or color.*"

We are not seeking here to reverse the *Ju Toy case*. It is the established law of the land, however disconcerting it may be to those who happen to be of recent foreign descent. Our position is that the case at bar does not fall within the decision of this Court in the *Ju Toy case* or of the previous case of *United States* v. *Sing Tuck*, 194 U.S., 161.

In the *Ju Toy case*, it is to be noticed that the Court was very particular to point out that it did not decide that a petition for a writ of *habeas corpus* should be denied, if the writ disclosed facts which indicated (1) an abuse of authority by the immigration officers; or (2) showed the existence of evidence not before the immigration officers and the Secretary of Commerce and Labor upon the appeal to him.

In the questions certified to this Court in the *Ju Toy case*, the first was, whether a District Court should grant a writ where the petition for the same alleged unlawful detention solely, on the ground

> "that petitioner does not come within the restrictions of the Chinese exclusion acts, because born in and a citizen of the United States *and does not allege or show in any other way unlawful action or abuse of*

their discretion or powers by the immigration officers who excluded him."

In the second question submitted to the Court in the *Ju Toy case*, the same limitation was attached, and the question was, whether the District Court should dismiss the writ or should direct a new or further hearing, where the answer showed that the applicant was granted a hearing by the immigration officers, who found he was not born in the United States, that his application for admission was considered and denied by such officers, and that the denial was affirmed on appeal to the Secretary of Commerce and Labor, and

"*where nothing more appears to show that such executive officers failed to grant a proper hearing, abused their discretion or acted in any unlawful or improper way upon the case presented to them for determination.*"

In the same way the third question submitted to this Court was, whether the District Court should treat the finding of the executive officers upon the question of citizenship which had been affirmed by the Secretary of Commerce and Labor as final and conclusive,

> "*unless it be made affirmatively to appear that such officers, in the case submitted to them, abused the discretion vested in them, or in some other way in hearing and determining the same committed prejudicial error.*"

It is therefore very evident that in the *Ju Toy case*, at least, the Circuit Court of Appeals was of the opinion that, where a petition for a writ of *habeas corpus* showed facts indicating arbitrary action and an abuse of their discretion by the immigration officers, then the writ must issue. Such also seems to have been the opinion of this Court, for Mr. Justice HOLMES in his discussion of the matter, prefaces his entire opinion with the words,

> "*We assume in what we have to say, as the questions assume, that no abuse of authority of any kind is alleged. That being out of the case, the first of them* [*the questions*] *is answered by the case of U. S. v. Sing Tuck, supra.*"

Again, a few lines further on in the opinion, Mr. Justice HOLMES, in speaking of the petition then before the Court, says :

> "*It disclosed neither abuse of authority nor the existence of evidence not laid before the Secretary.*"

It is therefore apparent that the only question decided in the *Ju Toy case* was, that a man claiming to be a citizen of the United States, who had been excluded and ordered deported from the country by an immigration officer, whose decision had been affirmed by the Secretary of Commerce and Labor, had no right to a writ of *habeas corpus* on a petition which simply alleged that he was a citizen of the United States. That, however, is not this case, for the petition of the appellant here alleges facts which show an abuse of the power and discretion vested in the immigration officer who heard his case. The appellant gives in his petition the names of a number of people who, as he says, could easily have shown conclusively that he was a citizen of the United States. He further states in his petition, that he was prevented by the immigration officer from producing these witnesses before them. He further says, that his attorneys were not permitted to see and read the evidence which had been taken before the immigration officer upon the investigation of his

case. In addition, he alleges that, as he believes, the witnesses examined by the immigration officers testified as to his having been born in the United States, and for the officers to find against him upon such evidence, without allowing him to produce further evidence of white witnesses as well as Chinamen, shows arbitrary action on their part, and an abuse of the powers and discretion given them by Congress.

The case of *U. S.* v. *Sing Tuck*, *supra*, has no bearing in the present discussion one way or the other, as the sole question decided in that case was, that an application could not be made for a writ of *habeas corpus* by a person of Chinese descent on the mere allegation of citizenship in the United States, prior to taking an appeal to the Secretary of Commerce and Labor from the decision of the immigration officer. In the case at bar, an appeal was taken from the ruling of the Chinese Inspector to the Secretary of Commerce and Labor before the application for the writ was made.

It would seem therefore that the question presented in this case is not controlled by the prior decisions of this Court, and is to be determined upon its own merits. It is a little difficult to see

what great harm can result by the granting of the writ of *habeas corpus* to investigate the truth of the allegations of a petition which says, that a citizen of the United States is arbitrarily, and because of abuse of the powers and discretion reposed in an immigration officer, ordered deported from his country. Such a decision will not result in hordes of Chinese coolies entering the United States. The federal courts will not be flooded with applications for writs to such an extent as to prevent them attending to their ordinary business. It would simply mean that a citizen of the United States whether of French or German or Italian extraction or of African or Chinese descent, or a descendant of the early settlers, who was ordered deported from his country, would have, as every citizen of the United States is entitled to have, a right to a writ of *habeas corpus* for the purpose of having an investigation into his detention and exclusion from his home.

It does not follow in the case at bar, that if a writ of *habeas corpus* had been granted, the Court upon an investigation into the facts would have found, that the appellant was a citizen of the United States and would have discharged him

from the custody of the Pacific Mail Steamship Company and permitted him to enter the United States. A further investigation of this case might have developed that the allegations of the petition were not true. It may be that the witnesses named by the petitioner would not, as he says, have been able to overwhelmingly show that he was born in the United States. With this, however, we have no concern. The ultimate disposal of this case upon the granting of the writ of *habeas corpus* is neither here nor there. The real question in this case is, shall a man who insists that he is a citizen of the United States, and that he is excluded by the arbitrary action of, and the abuse of the powers and discretion reposed in, the immigration officers, be deported from his country without an opportunity in the courts to show whether what he says with reference to an abuse of the discretion and power by the immigration officials is true.

Section 9 of Article I. of the Constitution provides that

> "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

The exceptions of the Constitution are not found in the case of this solitary man seeking to return to the country of his birth. Under all other conditions than those excepted, the privilege of this writ is given to citizens of the United States. The appellant says, that he is a citizen, and that he could have demonstrated that fact to the government officers, who ordered him deported, if he had been permitted to produce before them certain witnesses whom he names. Under the conditions of this case, and the provisions of the Constitution, will this Court hold that the refusal to grant the writ was proper. What grave question is at stake requiring such a conclusion? What would be gained by such a decision beyond the denying the great right given by the Constitution to prevent what some would have us believe would be many applications in the courts for writs by alleged citizens seeking admission to this country? Is the writ to be denied to save the courts from business? The courts are established to transact business, and not to escape it, and such a reason for refusal is not to be thought of. No other can be suggested. It is better that a thousand applications for the writ should be made and granted, and after investigation the

writ dismissed, than that one *bona fide* citizen of the United State should be deported from his country because of a refusal by the courts to grant the writ.

There are no authorities which bear in any way upon this proposition. The immigration cases of which *The Japanese Immigrant Case*, 189 U. S., 86, *Lem Moon Sing* v. *United States*, 158 U. S., 538 and *Fok Yong Yo* v. *United States*, 185 U. S., 296, are illustrations, have nothing to do with the question, as they simply hold that the decision of the immigration officer with reference to the right of an *alien* to enter this country is final, when affirmed on appeal by the Secretary of Commerce and Labor. The rights of a citizen are, however, very different from the rights of an alien, as was pointed out by Mr. Justice GRAY in *U. S.* vs. *Wong Kim Ark*, 169 U. S., 649, where he said at page 653:

> "It is conceded that, if he is a citizen of the United States, the acts of Congress, known as the Chinese Exclusion Acts, prohibiting persons of the Chinese race, and especially Chinese laborers, from coming into the United States, do not and cannot apply to him."

As we have shown above, the case of *U. S.* vs.

Sing Tuck, 194 U. S., 161, has no bearing on the present controversy, and the case of *U. S.* v. *Iu Toy*, 198 U. S., 253, expressly excepted the case at bar, and Mr. Justice HOLMES was particular to point out in his opinion, that the Court was not attempting to decide the question now presented, but on the contrary if anything was indicated by the decision of Mr. Justice HOLMES with reference to the question now under discussion, it was that upon such an application as the appellant has made in the present case, the writ of *habeas corpus* should issue in order that an investigation of the matter might be had.

It is therefore respectfully submitted that upon the petition in this case, a writ of *habeas corpus* should have issued, and an opportunity should have been given to the appellant to produce the witnesses whose testimony he was prevented from presenting to the immigration officers.

SECOND POINT.

The judgment of the Court below should be reversed and the writ of habeas corpus issued.

MAXWELL EVARTS,
Of Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 76.

CHIN YOW,
Appellant,
AGAINST
THE UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

REPLY BRIEF OF APPELLANT.

The Government has raised in its brief the question of jurisdiction, claiming that, because of the absence of the certificate of the court below that the petition for the writ was dismissed for want of jurisdiction to entertain it, this court cannot hear this appeal and must dismiss the case for want of jurisdiction.

It was, of course, long ago settled that a

certificate in the strict sense of the word was not required, but that "the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction" (*Huntington* v. *Laidley*, 176 U. S., 668, 676).

It is insisted that this record fulfills the conditions imposed by the decision just cited. The application for the writ was made to Judge DEHAVEN. He denied it. Appeal papers were prepared and handed him showing the appeal to be taken from his order denying the application, on the ground that he had held he had no jurisdiction to entertain the petition for the writ of *habeas corpus*. Judge DEHAVEN then signed an order allowing the appeal as prayed for (Record, p. 7).

Now of course when Judge DEHAVEN allowed the appeal as prayed for, it was allowed upon all the papers that went to make up the appeal. The assignment of errors was quite as important a paper as the petition for appeal and in the assignment of errors it clearly appears that the error attributed to the court below was that the writ was denied because the court considered that it was without jurisdiction to entertain it and that that was the sole question in the case.

In *Huntington* v. *Laidley* (*supra*), this court after speaking of the necessity of its appearing in the record that the question of jurisdiction was the sole question sent up by the court below for consideration, went on to show in how many ways this sufficiently appeared in the record then before it to give the court jurisdiction and among other things said at p. 677:

> "This dismissal of the suit for want of jurisdiction *was the only ground assigned for the appeal*, and the appeal was allowed 'as prayed for.'"

So in the case at bar the dismissal of the proceeding for want of jurisdiction was the only ground assigned for the appeal, and the appeal was allowed as prayed for. If in the Huntington case such an assignment and allowance of the appeal was sufficieent to give the court jurisdiction, why is it not enough in the present appeal?

It would seem to make no difference whatever whether the ground assigned for the appeal was in a separate paper or was incorporated in the petition for appeal. These papers are in every proper sense one paper, and go to make up the necessary steps preliminary to the allowance of the appeal, and the judge who heard the

application for the writ in this case and received the appeal papers, and on such papers allowed the appeal as prayed for, understood that by allowing the appeal on such an assignment of error he was sending up "for consideration a single and definite question of jurisdiction" (*supra*).

That a certificate was never considered essential in a case of this character is shown by the decision in Lem Moon Sing v. United States, 158 U. S., 538, where no certificate was sent up from the court below and the objection to the jurisdiction of this court because of its absence was not raised by the Government, and was not discussed in the opinion of the court.

It is respectfully submitted that this record shows distinctly and unequivocally, that the court below sent up for consideration a single and definite question of jurisdiction as required by the decision in *Huntington* v. *Laidley* (*supra*), and that it could not have been shown more clearly by a certificate.

It is further respectfully submitted that there never was a case which merited the broad construction of the requirements of an appeal direct to this court heretofore given, more than the case

at bar. For two years and a half the appellant has submitted voluntarily to imprisonment in solitary confinement in order that he might have an opportunity in an American court to prove (what the Inspectors would not permit) that he was an American citizen. Few white American citizens would have done as much, none could have done more. Such patient endurance is almost proof of his claim. It is therefore most earnestly asked that a broad construction be placed upon this record and that the court take jurisdiction of the case.

MAXWELL EVARTS,
Counsel for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

CHIN YOW, APPELLANT,
v.
THE UNITED STATES. } No. 76.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

All that appears from the record in this case is that the appellant, Chin Yow, presented his petition for a writ of *habeas corpus* to the District Court, and that after hearing his counsel the court denied the petition (Rec., 5). The reasons for such denial do not appear.

The assignments of error filed in the court below (Rec., 6) suggest that the court denied the petition on the ground of want of jurisdiction, but the record contains no certificate to that effect by the court, nor does the fact otherwise appear.

In this court the specifications of error in the brief of counsel for the appellant (pp. 4, 5) differ

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from the assignments of error filed below, and contain no reference to the alleged question of jurisdiction.

ARGUMENT.

I.

This court has no jurisdiction of the appeal.

The jurisdiction of this court depends (act of March 3, 1891, c. 517, sec. 5, 26 Stat., 826) upon—

(*a*) Whether the case was one involving the jurisdiction of the lower court, in which case the question of the jurisdiction alone is to be certified to this court.

The absence of such a certificate, or some equivalent therefor, is fatal to the appeal. (*Courtney* v. *Pradt*, 196 U. S., 89, 91–92.) As stated, there is no such certificate or its equivalent in this case.

(*b*) Whether the case involved the construction or application of the Constitution of the United States.

The petition does not expressly assert any right or privilege under the Constitution. Whatever may be sought to be implied, it certainly can not be said that it appears from the petition, "by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States." (*Western Union Telegraph Company* v. *Ann Arbor Railroad Company*, 178 U. S.,

244; *American Sugar Refining Company* v. *New Orleans*, 181 U. S., 281.)

In *Carey* v. *Houston and Texas Central Railway Company* (150 U. S., 170, 181) this court said:

> The bill before us refers to no provision of the Constitution upon which complainants relied to invoke the action of the court in vindication of their supposed rights, or which was presented to be construed or applied by the court. No question upon such construction or application was raised between the parties upon the record, or determined by the decree of the Circuit Court.
>
> It is argued that the record shows that complainants had been deprived of their property without due process of law, by means of the decree attacked, but because the bill alleged irregularities, errors, and jurisdictional defects in the foreclosure proceedings, and fraud in respect thereof and in the subsequent transactions, which might have enabled the railroad company upon a direct appeal to have avoided the decree of sale, or which, if sustained on this bill, might have justified the Circuit Court in setting aside that decree, it does not follow that the construction or application of the Constitution of the United States was involved in the case in the sense of the statute. In passing upon the validity of that decree the Circuit Court decided no question of the construction or the application of the Constitution, and, as we have said, no such question was raised for its consideration. Our conclusion is that the motion to dismiss the appeal must be sustained.

In this case it does not appear that the court below decided any question as to the construction or application of the Constitution. For aught that is shown, it may have dismissed the petition on the ground of want of jurisdiction alone, or because of general lack of merit.

The petition merely alleges (Rec., 2) "that the imprisonment, detention, confinement and restraint aforesaid are illegal, and the illegality thereof consists in this, to wit." Then follow the allegations, which are to the effect that the proceedings had before the immigration authorities in this case, under and in pursuance of the rules of the Secretary of Commerce and Labor, arbitrarily and illegally deprived the applicant of his right to come into the United States. The allegation that the action of the immigration authorities was "illegal" does not necessarily, or even ordinarily, mean that it was in violation of the petitioner's constitutional rights.

The constitutionality of the rules and regulations of the Secretary of Commerce and Labor referred to in the petition was upheld by this court in the cases of *United States* v. *Sing Tuck* (194 U. S., 161) and *United States* v. *Ju Toy* (198 U. S., 253). That is no longer an open question, and can not be made the basis of an appeal to this court, even if it were properly raised.

In *Harris* v. *Rosenberger* (145 F. R., 449) the Circuit Court of Appeals for the Eighth Circuit in holding that it had jurisdiction upon appeal from the Circuit Court of a case in which certain constitutional ques-

tions were sought to be raised, after citing the decisions of this court to the effect that in order to establish the right to a direct appeal to this court the constitutional claim must be real and substantial, said (pp. 452, 453):

> Whether the question of the construction or application of the Constitution, or of the constitutional validity of an act of Congress, is real and substantial, or is merely colorable and without reasonable foundation, depends, inter alia, upon whether it is an open one in the Supreme Court, or has been solemnly and directly determined by that court. As was said by Mr. Justice Brewer, then circuit judge, in *State of Kansas* v. *Bradley* (C. C., 26 Fed., 289):
>
> When a proposition has once been decided by the Supreme Court, it can no longer be said that in it there still remains a federal question. More correctly it is said there is no such question, state or federal. This is the only fair starting point for consideration of a case like this.
>
> * * * * *
>
> We do not stop to here enumerate or discuss the several constitutional questions sought to be raised by the bill. Considering the manner in which this branch of the case has been presented to us, it is deemed sufficient to say that such of these questions as could originally have been said to possess any color of merit had been fully considered by the Supreme Court and by it determined adversely to the appellee's contention prior to the institution of this suit.

II.

The order of the court below in denying the application was right.

The petition is plainly an attempt to get the District Court to review the action of the immigration officers in holding that the petitioner was not a citizen of the United States. That Congress may commit the determination of the question of citizenship to Executive officers, and has done so, was decided by this court in the *Sing Tuck* and *Ju Toy* cases. It is true that in the *Ju Toy* case it was suggested that a writ of *habeas corpus* might lie where an abuse of authority on the part of the immigration officers was shown, but there is no abuse of authority shown by the petition in this case. With a single exception, the proceedings in this case appear on the face of the petition to have been in conformity with the rules and regulations of the Secretary of Commerce and Labor, which were upheld in the cases above referred to. The exception referred to is the allegation that the applicant's "attorneys, Marshall B. Woodworth and O. P. Stidger, were not, and have not since said denial to land, been permitted to read, or even peruse, and much less to make a copy of the evidence and proceedings had before said Commissioner of Immigration upon the investigation above referred to." (Rec., 3.) This circumstance, assuming it to be true, was contrary to the provision of rule 7 cited in the application (Rec., 3, 4), which permits the applicant's counsel, after filing notice of appeal, to examine,

but not to make copies of, the evidence upon which the excluding decision is based. But this was an irregularity which might have been corrected by the Secretary of Commerce and Labor, and the application does not state that the matter was ever called to his attention. In *The Japanese Immigrant case* (189 U. S., 86, 101–102) the court held that irregularities in the conduct of the examination of an immigrant were matters to be called to the attention of the officer primarily in charge, as well as to the Secretary upon appeal, and did not warrant the interference of the courts.

It will be observed that the petition states that "his attorneys, Marshall B. Woodworth and O. P. Stidger," were not, and have not, since said denial to land, been permitted to read the evidence or proceedings had before the Commissioner of Immigration. This language is disingenuous, and leaves in doubt whether any other attorneys employed by the petitioner were, or were not, permitted to make such examination. It may, perhaps, be permissible to say that the records of the Department of Commerce and Labor show that the applicant did have other attorneys here in Washington who had opportunity to examine and read the evidence and proceedings before the immigration officials at San Francisco.

The petition also alleges (Rec., 3) that, had the "petitioner been given the opportunity to have an attorney and to communicate with his friends and other persons, he could have produced abundant

and overwhelming evidence to show that he was born in the United States, and remained within the United States, until 1904, when he departed to China on a temporary visit," and that he could have produced persons who would have so testified. The petition had already stated, however (Rec., 2), that the officials of the Commissioner of Immigration "caused an investigation and examination of the right of your petitioner to land on the ground that he was born in the United States, and that they examined, besides the sworn statement of your petitioner, but —— Chinese persons, who, so your petitioner is informed and believes, testified that your petitioner was born in the United States."

It therefore appears that, while the examination and investigation was conducted in the summary way provided for by the rules and regulations of the Secretary of Commerce and Labor, the applicant, although not permitted, in accordance with those rules and regulations, to have communication with other persons, did have an opportunity to produce witnesses and that such witnesses were summoned and appeared and testified in his behalf.

The allegation (Rec., 2) that "the Commissioner of Immigration arbitrarily and in gross abuse of his discretion as such officer, and without legal or any cause or justification, rejected the testimony and sworn statements of said petitioner and of the Chinese persons referred to, and denied your petitioner a landing within the United States," presents no abuse of

power or discretion on the part of the Commissioner of Immigration, as it was clearly his duty to pass upon the sufficiency of such testimony.

In *Lee Sing Far* v. *United States* (94 F. R., 834), a *habeas corpus* proceeding in which a Chinese woman sought to enter the United States as a native-born citizen, the Circuit Court of Appeals for the Ninth Circuit said (pp. 836, 837):

> The question which we are called upon to decide is not whether there was any evidence tending to establish the fact that appellant was born in the United States, but is whether the evidence is so clear and satisfactory upon that point as to authorize this court to say that the court erred in refusing her to land, and in entering judgment that she be remanded. From the testimony it appears that appellant is of Chinese parentage. She has been in China, with her mother, for seventeen years. In such a case it can not be said that any presumption arises that she was born in the United States. It, therefore, devolves upon her to prove to the satisfaction of the court that she was born in this country. It does not necessarily follow that because four witnesses have testified positively that she was born in San Francisco, there being no witness to the contrary, their statements upon this question must be accepted as true. If such a rule were adopted and followed, there would be no more Chinese remanded in such cases. It is safe to say that the United States is powerless to make any proof in any case as to the place

of birth of Chinese children. In the very nature of the case it would, as a general rule, be impossible to do so. The only protection to the Government, in the enforcement of the exclusion act in this character of cases, lies in the cross-examination of each witness, on behalf of the petitioner, whereby the "crucial test" of his credibility may be applied.

It is further to be observed that the averment of the petition that, had the "petitioner been given opportunity to have an attorney, and to communicate with his friends and other persons, he could have produced abundant and overwhelming evidence to show that he was born in the United States, and remained within the United States, until 1904, when he departed to China on a temporary visit," was insufficient to show that he would have been able to prove that he was a citizen of the United States. Under the *Wong Kim Ark case* (169 U. S., 649, 705) birth alone of a Chinese child in the United States is not sufficient to make him a citizen, but it must further appear that his parents at the time of his birth had a permanent domicile and residence in the United States and were not employed in any diplomatic or official capacity under the Chinese Government. The allegations of the petition do not meet these requirements.

The record states that the District Court denied the petition after hearing counsel for petitioner. What was said by petitioner's counsel does not appear, but it is evident that the court thought that the allegations of the petition, as explained and elucidated by counsel, did not warrant the issuance of the writ prayed.

It would seem impossible to say on this record that this was not a proper exercise of the discretion which the United States courts possess upon applications for the writ of habeas corpus.

It will also be observed that this was entirely an *ex parte* proceeding before the District Court, the United States receiving no notice of the matter until the appeal was taken.

It is respectfully submitted that the appeal should be dismissed for want of jurisdiction; or, if the court shall take jurisdiction, that the order of the District Court denying the petition should be affirmed.

ALFORD W. COOLEY,
Assistant Attorney-General.

DECEMBER, 1907.

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CHIN YOW *v.* UNITED STATES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 76. Submitted December 13, 1907.—Decided January 6, 1908.

The conclusiveness of the decision of the Commissioner of Immigration, denying a person the right to enter the United States under the immigration laws, must give way to the right of a citizen to enter and also to the right of a person seeking to enter, and alleging that he is a citizen, to prove his citizenship, and it is for the courts to finally determine the rights of such person.

A Chinese person seeking to enter the United States and alleging citizenship is entitled to a fair hearing, and if, without a fair hearing or being allowed to call his witnesses, he is denied admission and delivered to the steamship company for deportation, he is imprisoned without the process of law to which he is entitled; and although he has not established his right to enter the country, the Federal court has jurisdiction to determine on *habeas corpus* whether he was denied a proper hearing and if so, to determine the merits; but unless and until it is proved that a proper hearing was denied the merits are not open. *United States* v. *Ju Toy*, 198 U. S. 253, distinguished.

Denial of a hearing by due process cannot be established merely by proving that the decision on the hearing that was had was wrong.

THE facts are stated in the opinion.

Mr. Maxwell Evarts, for appellant:

A United States District Court cannot refuse to grant a writ of *habeas corpus* upon a petition alleging that the applicant is a citizen of the United States, and asserting facts showing that he was ordered deported from his country by the arbitrary action of the immigration officers and the abuse of their discretion and powers.

Where, as in this case, the petitioner alleges facts which show an abuse of the power and discretion vested in the im-

migration officer who heard his case, and gives in his petition the names of a number of persons, who, as he alleges, could easily have shown conclusively that he was a citizen of the United States, and further states in his petition, that he was prevented by the immigration officer from producing these witnesses before him, and that his attorneys were not permitted to see and read the evidence which had been taken before the immigration officer upon the investigation of his case, then, in such a case, the rules laid down by this court in the case of *United States* v. *Ju Toy*, 198 U. S. 253, do not apply.

The privilege of the writ of *habeas corpus* cannot be denied to a man who insists that he is a citizen of the United States, and that he is excluded by the arbitrary action of, and the abuse of the powers and discretion reposed in, the immigration officers, and is to be deported from his country without an opportunity in the courts to show whether what he says with reference to an abuse of the discretion and power by the immigration officials is true.

The rights of a citizen are very different from the rights of an alien. *United States* v. *Wong Kim Ark*, 169 U. S. 649, 653. *The Japanese Immigrant Case*, 189 U. S. 86, *Lem Moon Sing* v. *United States*, 158 U. S. 538, and *Fok Yong Yo* v. *United States*, 185 U. S. 296, and other immigration cases discussed and distinguished.

Mr. Assistant Attorney General Cooley, for appellee:

This court has no jurisdiction of the appeal herein. The lack of the certificate required by the act of March 3, 1891, c. 517, § 5, 26 Stat. 826, or some equivalent thereof, is fatal to the appeal. *Courtney* v. *Pradt*, 196 U. S. 89, 91, 92.

The petition does not expressly assert any right or privilege under the Constitution. Whatever may be sought to be implied, it certainly cannot be said that it appears from the petition, "by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does

really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States." *Western Union Telegraph Co.* v. *Ann Arbor R. R. Co.*, 178 U. S. 244; *American Sugar Refining Co.* v. *New Orleans*, 181 U. S. 281; *Carey* v. *Houston and Texas Central Ry. Co.*, 150 U. S. 170, 181.

The constitutionality of the rules and regulations of the Secretary of Commerce and Labor, referred to in the petition, was upheld by this court in the cases of *United States* v. *Sing Tuck*, 194 U. S. 161, and *United States* v. *Ju Toy*, 198 U. S. 253. That is no longer an open question, and cannot be made the basis of an appeal to this court, even if it were properly raised.

The averment of the petition that, had the "petitioner been given opportunity to have an attorney, and to communicate with his friends and other persons, he could have produced abundant and overwhelming evidence to show that he was born in the United States, and remained within the United States, until 1904, when he departed to China on a temporary visit," was insufficient to show that he would have been able to prove that he was a citizen of the United States. Under the *Wong Kim Ark case*, 169 U. S. 649, 705, birth alone of a Chinese child in the United States is not sufficient to make him a citizen, but it must further appear that his parents at the time of his birth had a permanent domicil and residence in the United States and were not employed in any diplomatic or official capacity under the Chinese Government. The allegations of the petition do not meet these requirements.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for *habeas corpus* by a Chinese person, alleging that he is detained unlawfully by the General Manager of the Pacific Mail Steamship Company on the ground that he is not entitled to enter the United States. The petition alleges that the petitioner is a resident and citizen of the United

States, born in San Francisco of parents domiciled there, but it discloses that the Commissioner of Immigration at the port of San Francisco, after a hearing, denied his right to land, and that the Department of Commerce and Labor affirmed the decision on appeal. The petitioner thereupon was placed in custody of the steamship company to be sent to China. So far the case is within *United States* v. *Ju Toy*, 198 U. S. 253, and the petition was dismissed for want of jurisdiction (presumably on the ground of that decision), as sufficiently appears from the record, the reasons assigned for the appeal and the order allowing the same. But the petition further alleges that the petitioner was prevented by the officials of the Commissioner from obtaining testimony, including that of named witnesses, and that had he been given a proper opportunity he could have produced overwhelming evidence that he was born in the United States and remained there until 1904, when he departed to China on a temporary visit. We do not scrutinize the allegations as if they were contained in a criminal indictment before the court upon a special demurrer, but without further detail read them as importing that the petitioner arbitrarily was denied such a hearing and such an opportunity to prove his right to enter the country as the statute meant that he should have. The question is whether he is entitled to a writ of *habeas corpus* on such a case as that.

Of course if the writ is granted the first issue to be tried is the truth of the allegations last mentioned. If the petitioner was not denied a fair opportunity to produce the evidence that he desired, or a fair though summary hearing, the case can proceed no farther. Those facts are the foundation of the jurisdiction of the District Court, if it has any jurisdiction at all. It must not be supposed that the mere allegation of the facts opens the merits of the case, whether those facts are proved or not. And, by way of caution, we may add that jurisdiction would not be established simply by proving that the Commissioner and the Department of Commerce and

Labor did not accept certain sworn statements as true, even though no contrary or impeaching testimony was adduced. But, supposing that it could be shown to the satisfaction of the District Judge that the petitioner had been allowed nothing but the semblance of a hearing, as we assume to be alleged, the question is, we repeat, whether *habeas corpus* may not be used to give the petitioner the hearing that he has been denied.

The statutes purport to exclude aliens only. They create or recognize, for present purposes it does not matter which, the right of citizens outside the jurisdiction to return to the United States. If one alleging himself to be a citizen is not allowed a chance to establish his right in the mode provided by those statutes, although that mode is intended to be exclusive, the statutes cannot be taken to require him to be turned back without more. The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation on the one side and the conclusiveness of the Commissioner's fiat on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the courts. In order to decide what we must analyze a little.

If we regard the petitioner, as in *Ju Toy's case* it was said that he should be regarded, as if he had been stopped and kept at the limit of our jurisdiction, 198 U. S. 263, still it would be difficult to say that he was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China. The case would not be that of a person simply prevented from going in one direction that he desired and had a right to take, all others being left open to him, a case in which the judges were not unanimous in *Bird* v. *Jones*, 7 Q. B. 742. But we need not speculate upon niceties. It is true that the petitioner gains no additional right of entrance by being allowed to pass the

frontier in custody for the determination of his case. But on the question whether he is wrongly imprisoned we must look at the actual facts. *De facto* he is locked up until carried out of the country against his will.

The petitioner then is imprisoned for deportation without the process of law to which he is given a right. *Habeas corpus* is the usual remedy for unlawful imprisonment. But on the other hand as yet the petitioner has not established his right to enter the country. He is imprisoned only to prevent his entry and an unconditional release would make the entry complete without the requisite proof. The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship a longer restraint would be illegal. If he fails the order of deportation would remain in force.

We recur in closing to the caution stated at the beginning, and add that while it is not likely, it is possible that the officials misinterpreted Rule 6 as restricting the right to obtain witnesses which the petitioner desired to produce, or Rule 7, commented on in *United States* v. *Sing Tuck*, 194 U. S. 161, 169, 170, as giving them some control or choice as to the witnesses to be heard. But unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong.

Order reversed.
Writ of habeas corpus to issue.

MR. JUSTICE BREWER concurs in the result.